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No. 91-760

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JOAN PETRONE, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a social security claimant whose disability benefits are reinstated following a remand and re-adjudication required by the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, is a prevailing party for purposes of an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 936 F.2d 428. The opinion of the district court (Pet. App. 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1991. A petition for rehearing was denied on August 12, 1991 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on November 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner received disability insurance benefits and supplemental security income benefits based on applications filed in 1966 and 1976. Pet. App. 2a. In December 1982, the Secretary of Health and Human Services concluded that petitioner's medical condition had improved so that she was no longer disabled, and therefore terminated benefits. Pet. App. 10a. Petitioner sought administrative review, but the Secretary's ruling was upheld at all administrative levels. Pet. App. 2a. Petitioner then filed this action seeking judicial review of the Secretary's final decision that she was no longer entitled to benefits. While petitioner's case was pending in district court, Congress passed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794. Pet. App. 2a. That Act required the remand of all pending benefit termination cases to the Secretary for readjudication under a newly enacted medical improvement standard. Pub. L. No. 98-460, § 2(a) and (d)(2)(C), 98 Stat. 1794, 1797-1798. Petitioner's suit was remanded as required by the Reform Act, and the Secretary, applying the new statutory standard, reinstated petitioner's benefits through November 1984. Pet. App. 11a, 26a.[1]

2. Petitioner filed an application for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), which provides for the recovery under certain circumstances of attorney fees

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[1] No benefits were payable to petitioner after November 1984 because of her earnings; disability payments were stopped effective May 1985 because the Secretary concluded that petitioner was no longer disabled. Pet. App. 11a, 26a. Petitioner apparently does not challenge these conclusions. Pet. 3-4. The termination date of petitioner's benefits is incorrectly stated in the court of appeals decision (Pet. App. 2a).

by a party who prevails in a civil suit against the government when the government's position is not substantially justified. Adopting the United States Magistrate's recommendation that an EAJA fee be denied because petitioner was not a prevailing party (Pet. App. 8a-19a), the district court denied the fee request (Pet. App. 20a-21a). The court of appeals affirmed (Pet. App. 1a-7a). The appellate court, applying a de novo standard of review because the issue is a purely legal one (Pet. App. 2a-3a), concluded that petitioner was not a prevailing party under EAJA. The court applied prior circuit precedent defining a prevailing party as one who can show "a clear causal relationship" between the litigation and the successful outcome of the dispute (Pet. App. 3a). Petitioner failed to come within this definition, the court explained, because she "did not win reinstatement in the courtroom; she won because Congress changed the law. '[She] was a fortuitous beneficiary, and serendipity is not a reason for rewarding lawyers.' " *Ibid.*, quoting *Hendricks* v. *Bowen*, 847 F.2d 1255, 1259 (7th Cir. 1988) (Easterbrook, J., concurring).

The court rejected petitioner's argument that her suit was one of those providing a "catalyst" for the congressional action as "far too speculative to receive recognition;" even assuming Congress could be catalyzed by such lawsuits, "no clear causal relationship can be shown to this particular suit." Pet. App. 3a. The court also rejected petitioner's argument that the case should be remanded for a hearing to determine whether she was entitled to a fee because, but for the intervention of the Reform Act, a fee would have been awarded. Pet. App. 3a-4a. Judge O'Scannlain dissented; he would have remanded for a further

hearing to determine whether, absent the Reform Act, petitioner's victory was "inevitable." Pet. App. 6a.

ARGUMENT

Although there appears to be some disagreement among the circuits on the question presented by petitioner, the decision of the court of appeals in this case is correct, and the issue lacks prospective significance because the narrow class of cases involved is approaching extinction. Accordingly, further review by this Court is not warranted.

1. Petitioner asserts (Pet. 6-8) that the circuits are split on whether prevailing party status is to be accorded claimants who, after filing actions challenging the termination of their benefits, have those benefits reinstated under the remand and readjudication procedures of the Reform Act. Two theories to justify such awards have been advanced.

First, the "catalyst" theory advocated by petitioner has only been accepted by the Sixth Circuit in an alternative holding (*Perket* v. *Secretary of Health & Human Services*, 905 F.2d 129, 134-135 (1990)). All other circuits that have considered this theory have rejected it. Like the Ninth Circuit in the instant case, decisions of the First, Seventh, Eighth and Tenth Circuits would deny recovery under a catalyst theory. *Guglietti* v. *Secretary of HHS*, 900 F.2d 397 (1st Cir. 1990); *Hendricks* v. *Bowen*, 847 F.2d 1255 (7th Cir. 1988); *Truax* v. *Bowen*, 842 F.2d 995 (8th Cir. 1988); *Lopez* v. *Sullivan*, 882 F.2d 1533, 1536 (10th Cir. 1989).

As the *Hendricks* court explained, a claimant successful on remand under the Reform Act could not be considered a prevailing party under a catalyst theory because the "nexus between Congress' action

and [claimant's] suit is too attenuated to conclude that the latter played a 'provocative role' in causing the former." 847 F.2d at 1258. Moreover, the *Hendricks* court found no indication in the legislative history of the Reform Act that Congress contemplated that the remands required by that Act would result in federal fee liability, and concluded that the "lack of Congressional attention to the enormous financial impact of awarding attorneys' fees is evidence that Congress did not intend the EAJA to apply." *Id.* at 1259. Cf. *Truax*, 842 F.2d at 997 ("causal link between [claimant's] individual lawsuit and Congress's action is too tenuous to satisfy the catalyst test"); *Guglietti*, 900 F.2d at 401 (same); *Lopez*, 882 F.2d at 1536 (same); Pet. App. 3a (same).[2]

Second, some courts have accorded prevailing party status to claimants who have had their benefits reinstated under the Reform Act, relying on the "inevitable victory" theory proposed by the dissent below. Under that theory, if a claim would have prevailed absent the Reform Act, the claimant is entitled to EAJA fees. The Eighth Circuit, after finding an insufficient causal link between a claimant's suit and

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[2] The *Hendricks* court also rejected claimant's argument that he prevailed because, but for the lawsuit, there would have been no award of benefits. The court observed that "only in a hypertechnical sense" was the lawsuit the "cause" of victory; the "proximate cause of [claimant's] victory was the congressional enactment of a standard under which he was entitled to relief." *Hendricks*, 847 F.2d at 1258; accord *Guglietti*, 900 F.2d at 400 ("but for" argument "confuses a *condition* of recovery with a *cause* of recovery" and "distorts the EAJA framework"); *Truax*, 842 F.2d at 997; Pet. App. 3a-4a; but see *Hyatt* v. *Heckler*, 807 F.2d 376, 382 (4th Cir. 1986) (apparently accepting "but for" argument), cert. denied, 484 U.S. 820 (1987).

enactment of the Reform Act to support according the claimant prevailing party status in *Truax*, *supra*, later distinguished that case where it found a claimant's victory to have been inevitable (*Gowen* v. *Bowen*, 855 F.2d 613, 617 n.3 (1988)). In factual circumstances distinguishable from the instant case, decisions of the Fourth Circuit, *Rhoten* v. *Bowen*, 854 F.2d 667, 670 (1988); the Sixth Circuit, *Perket*, 905 F.2d at 133-134 (alternative holding); and the Tenth Circuit, *Lopez*, 882 F.2d at 1537, have also approved the award of EAJA fees under an inevitable victory rationale.[3]

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[3] In *Lopez*, the court first noted that the claim for benefits at issue in that case was *not* controlled by the Reform Act at all, and held that it "therefore * * * need not consider whether a mandatory remand [under the Reform Act] would have precluded prevailing party status for [the claimant]." 882 F.2d at 1535. The court went on, however, to remand for a determination of whether there was substantial evidence to support the original administrative determination that Lopez was not disabled—on the theory that if he would have prevailed under pre-Reform Act law, he would be entitled to an EAJA award. *Id.* at 1537. In *Rhoten*, the court noted that, as a result of plaintiffs' litigative efforts, it had remanded their cases to the Secretary *before* the enactment of the Reform Act. 854 F.2d at 669. Similarly, in *Perket*, the Secretary's denial of benefits was inconsistent with controlling circuit precedent—in the district court, the Secretary simply "challenged the validity" of that precedent. 905 F.2d at 133. In *Rhoten* and *Perket*, the argument that plaintiffs' victories were "inevitable" was thus far stronger than in the instant case, which was simply pending in the district court when the Reform Act was enacted. Cf. Pet. App. 17a-18a ("[t]he [district court] did not make even a preliminary determination of the adequacy of the Secretary's denial of plaintiff's benefits or the substantiality of the evidence supporting the Secretary's [pre-Reform Act] decision. In fact, a review of the issues raised by [petitioner's] Motion for Summary Judgment

We submit that the court of appeals correctly decided that petitioner, whose benefits were reinstated as a result of the administrative reconsideration of her case mandated by the Reform Act, not as a result of her civil suit, is not a prevailing party within the meaning of EAJA. The catalyst theory rests on a highly speculative assumption as to congressional motivation for enacting the Reform Act. The decisions relied upon by the Ninth Circuit explain the fallacy of the inevitable victory rationale. As the *Guglietti* court observed, that rationale improperly consolidates the prevailing party and lack of substantial justification standards, both of which a claimant must satisfy in order to be entitled to an EAJA fee (900 F.2d at 402). The court also expressed concern that acceptance of the inevitable victory approach would " 'spawn a second litigation of significant dimension,' [thereby] needlessly squandering scarce judicial resources." *Id.* at 403. The *Lopez* court, in remanding that case for a further hearing to determine whether an EAJA fee claimant would have prevailed absent the enactment of the Reform Act, expressed discomfort with the "awkward position" of requiring the district court to make such a hypothetical determination (882 F.2d at 1537). Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 561 (1988) (noting the undesirability of the "investment of appellate energy [in EAJA fee appeals that do not] produce the normal law-clarifying benefits that come from an appellate decision on a question of law"); *Texas State*

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reveals no challenge to either the Secretary's standards for finding medical improvement or the Secretary's mental health regulations. [Petitioner] requested remand of her case * * * not for review under new standards [,but for] * * * consideration of new and material evidence.").

Teachers Ass'n v. *Garland Independent School District*, 489 U.S. 782, 791 (1989) (warning against interpretation of fee statute that would "spawn a second litigation of significant dimension"); *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

2. Although we do not dispute petitioner's assertion that the circuits have reached differing results in considering EAJA fees in cases remanded under the Reform Act, this disparity does not warrant resolution by this Court. The question presented is relevant only to EAJA claims based on lawsuits pending as of September 19, 1984, and is thus of little continuing legal significance.

The decisions of the courts of appeals on the EAJA issue in this case affect only those benefit recipients who had been disqualified from receiving Social Security disability benefits prior to September 19, 1984, who appealed those decisions with the assistance of counsel, who had their benefits restored administratively after that date without additional litigation, and who have attorney fee petitions pending. While there may still be some such individuals, their numbers are steadily declining.[4] In such circumstances, further review to resolve any differences among the circuits as to the legal standards governing this ever-dwindling number of cases is not warranted. This Court recently denied review in a case raising this issue (*Kinney* v. *Sullivan*, 111 S. Ct. 538 (1990)). There is no reason for a different result here.

Petitioner tries to create continuing importance for her petition by asserting (Pet. 8) that the Court

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[4] Petitioner herself acknowledges (Pet. 8) that most cases remanded under the Reform Act have now been fully litigated.

should address the broader question of "whether a plaintiff whose victory coincides with a favorable change in the law can ever be considered a 'prevailing party' under [EAJA] or any other fee-shifting statute." But this case, and the other court of appeals decisions in issue, have examined EAJA's treatment of victories attained through legislative change in the law, and not those attained through judicial changes. Petitioner does not contend that Congress has ordered similar remands under other statutes. Instead, she relies on *Sullivan* v. *Zebley*, 493 U.S. 521 (1990), to argue that the question presented here is likely to recur. Pet. 9. In *Zebley*, this Court invalidated certain child-disability regulations promulgated by the Secretary of Health and Human Services. In response, the Secretary reassessed a class of child disability cases under newly promulgated regulations. The relation between the highly unusual legislative remand requirements contained in the Reform Act and the EAJA prevailing party requirement has little or no bearing on the relation between this Court's decision in *Zebley* (and/or the Secretary's reaction to it) and any claims for attorney fees—under EAJA or any other fee statute—that might be filed by claimants who recover benefits under the newly promulgated child disability regulations. At its broadest, the question in this case involves the relation between a legislatively required remand and the "prevailing party" requirement,[5] because different considerations govern the search for the necessary causal connection between a particular civil ac-

[5] That broad formulation, of course, overlooks the relevance of the language of the specific remanding Act at issue and its legislative history. See *Hendricks*, 847 F.2d at 1259 (considering legislative history of Reform Act).

tion and judicially or administratively instituted changes. See Pet. App. 3a. Legislatively required remands are at best highly unusual; moreover, in light of the fee litigation generated by the Reform Act, it is likely that any future such legislation will contain a specific provision regarding fee availability.

In short, petitioner's assertion that this case presents an issue that is likely to recur in other contexts is highly speculative. Any EAJA issues raised as a result of the Secretary's remand directive under the post-*Zebley* regulations, or other future changes in the rules governing benefit eligibility, should be addressed in the contexts in which they arise, not speculatively in this case, which arises in the context of a change with little continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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